Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
Digital Audio Broadcasting Systems	)	
And Their Impact on Terrestrial	)	
Radio Broadcast Service	)	MM Docket No. 99-325
	)	

REPLY COMMENTS OF PUBLIC KNOWLEDGE, CONSUMERS UNION, AND CONSUMER FEDERATION OF AMERICA

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Public Knowledge, Consumers Union, and Consumer Federation of America (hereinafter Consumer Group Coalition) hereby submit these comments in reply to comments filed in the Commission's *Further Notice of Proposed Rulemaking and Notice of Inquiry* in the above-captioned proceeding.[1] As we discuss below, there is no evidence that content protection and recording restrictions for digital audio broadcasting (DAB) are either warranted or within the Commission's jurisdiction. The Commission should advance DAB without limiting lawful home recording and should reject requests to impose technological mandates that will change the way radio listeners use and enjoy free over-the-air radio broadcasts.

[1] *In the Matter of Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service,* MM Docket No. 99-325, Further Notice of Proposed Rulemaking and Notice of Inquiry, 19 F.C.C.R. 7505 (Apr. 20, 2004) [hereinafter *NOI*].

I. INTRODUCTION AND SUMMARY

The Consumer Group Coalition is hopeful that DAB will expand the offerings of free over-the-air radio and provide new opportunities for innovative consumer electronics and related devices. DAB, in combination with new technologies, could provide radio listeners with unprecedented access to broadcast information and music and invigorate the radio broadcast marketplace.[2] None of this will occur if the Commission saddles DAB with home recording restrictions and implements the Recording Industry Association of America's (RIAA) requested usage rules,[3] in turn limiting the functionality of DAB devices.

Preventing lawful home recording and implementing copyright policy is outside of the Commission's jurisdiction. The Commission lacks express and ancillary authority to adopt and enforce restrictions on DAB devices and home recording of broadcast radio.

Home recording of broadcast radio is legal. No commentator disputes this plain fact. Recording broadcast radio is also explicitly endorsed by Congress. The RIAA chooses to call lawful home recording "cherry-picking,"[4] but home recording is not the unlawful taking of another's property and it is not copyright infringement. In every instance that the RIAA uses the derogatory term "cherry-picking," a more accurate substitute for that word choice is "lawful home recording." In no way should the Commission conflate lawful home recording with copyright infringement.[5]

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[2] *See, e.g.,* Janet Whitman, *Clear Channel to Roll Out Digital Radio at 1,000 Stations*, **CNN Money** (July 22, 2004), *at* money.cnn.com/services/tickerheadlines/djh/200407220025DOWJONESDJONLINE000009.htm.

[3] Comments of the Recording Industry Association of America, Inc., MM Docket No. 99-325, 58-60 (June 16, 2004) [hereinafter RIAA Comments].

[4] *Id*. at 57.

[5] Even if the Commission were to equate the two, copyright policy is a matter outside the reach of the FCC.

Our comments show that there is no evidence that DAB will suddenly create a problem, particularly where one does not currently exist with regards to analog radio. Also, a decade of DAB in Europe has not led to any measurable instances of copyright infringement associated with digital radio.

The Commission should not adopt any of the RIAA's proposed DAB usage rules or require DAB devices to obey home recording restrictions. Instead, the Commission should move DAB forward with the hopes of creating a market for new digital radio devices and reaching a larger radio audience.

II. THE COMMISSION DOES NOT HAVE EITHER THE EXPRESS OR THE ANCILLARY AUTHORITY NECESSARY TO REQUIRE CONSUMER ELECTRONICS DEVICES AND COMPUTERS TO RECOGNIZE AND OBEY A DIGITAL RADIO CONTENT PROTECTION MECHANISM.

The RIAA asserts that the Commission has both express and ancillary authority to require consumer electronics devices and computers to recognize and obey a digital radio content protection mechanism that would prevent lawful home recording.[6] However, they are unable to cite to even one section of the Communications Act that mentions either content protection or digital radio.

The Consumer Group Coalition will address the RIAA's specific jurisdictional arguments below, but we wish to make one larger point: to accept the RIAA's argument would be akin to an admission that the Commission's powers to act with respect to anything remotely related to radio is without limits. Thankfully the courts, and specifically the DC Circuit, have found the opposite – that the Commission's authority to

[6] RIAA Comments at 42-57.

act must have some specific basis in the statute, and must be based on some evidence beyond mere speculation, that there is a harm which needs correction.

A. Nothing in the Communications Act Confers Express Authority on the Commission to Require Consumer Electronics Devices and Computers to Obey a Digital Radio Content Protection Mechanism

The RIAA argues that the Communications Act confers express authority on the FCC to require consumer electronics devices and computers to obey a digital radio content protection mechanism.[7] To support this theory, they cite Section 303 of the Communications Act, which outlines the general powers of the Commission, including the authority to "[p]rescribe the nature of the service to be rendered by" radio stations and to "[s]tudy new uses for radio…and generally encourage the larger and more effective use of radio in the public interest."[8] However, nothing in the language of this section, or any other section in the Communications Act, expressly delegates authority to the Commission to require technological devices and consumer manufacturers to obey a content protection scheme for digital radio. In fact, unlike digital television, there is no mention of digital radio anywhere in the Act.

To the extent that the Commission has regulated consumer electronics devices in the past, it has done so only under express statutory authority. For example, the FCC required television sets to receive all UHF and VHF channels pursuant to the 1962 All Channel Receiver Act.[9] The Commission regulated closed-captioning pursuant to the 1990 Television Decoder Circuitry Act.[10] Recently, the Commission promulgated

[7] RIAA Comments at 43.
[8] 47 U.S.C. § 303 (b), (g). *See also* RIAA Comments at Part IV.
[9] Pub. L. 87-529, 76 Stat. 150 (codified at 47 U.S.C. §§ 303(s), 330(a)).
[10] Pub. L. No. 101—431, 104 Stat. 960 (1990) (codified at 47 U.S.C. §§ 303(u), 330(b)).

regulations requiring television sets to include a V-Chip pursuant to Section 551 of the Telecommunications Act of 1996.[11] There is no such express mandate here.

B. The Dictates of Federal Copyright Law are Irrelevant in Determining Whether the Commission Has Authority to Adopt a Digital Radio Content Protection Scheme, and in Any Event, Would Require the Commission Not to Adopt Such a Scheme.

RIAA argues that the Commission must honor federal copyright law in considering whether to adopt a content protection scheme for digital radio, and that such law requires the result the RIAA seeks.[12]

But while the Commission has in the past sought to accommodate other federal laws that may have relevance in a particular matter, they cannot do so where, as here, they do not have the authority to act in the first place. Contrary to what the RIAA appears to argue,[13] the Copyright Act gives the FCC no independent authority to act – that authority must come from the Communications Act.[14]

In any event, federal copyright law and policy argue for a result exactly opposite from what the RIAA seeks. Let us be clear – the RIAA is not seeking merely to stop Internet redistribution here. They are seeking to prevent noncommercial home recording of material broadcast over the public airwaves. This is a right that Congress expressly protected when it passed the Audio Home Recording Act of 1992.[15]

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[11] Pub. L. No. 104-104, sec. 551, 110 Stat. 56, 139-42 (1996) (codified at 47 U.S.C. §§ 303(x), 330(c)).
[12] RIAA Comments at 45-48, 53-54.
[13] RIAA Comments at 48 ("Pursuant to this well established principle [that the FCC honor other federal policies], the Commission has jurisdiction to require that broadcasters who wish to operate digitally must do so in a manner that recognizes the intellectual property rights of copyright owners.").
[14] RIAA's reliance on the *Sports Blackout Order*, 54 FCC 2d 265 (1975) is wholly misplaced. The Commission's decision in that case was not premised on the preservation of intellectual property rights, but on the preservation of the National Football League's gate receipts.
[15] *See* 102 P.L. 563 § 1008. There is no claim of copyright infringement based on "the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or based on the noncommercial use by a consumer of

C. The Commission Has No Ancillary Jurisdiction to Require Consumer Electronics Devices and Computers to Read and Obey a Content Protection Mechanism for Digital Radio, Especially Because There is No Evidence it is Necessary to Preserve Free, Over-the-Air Radio.

The RIAA also asserts that the Commission has ancillary jurisdiction under Title I of the Communications Act to adopt a content protection scheme for digital broadcast radio.[16] Again unable to cite to any specific section in the Communications Act other than the Commission's general powers, the RIAA relies instead on Commission's recent decisions in its "broadcast flag" and "plug-n-play" dockets, federal copyright law, and a good deal of speculation about the harms that will occur should the Commission decline to require digital radio copy protection.[17]

The RIAA's reliance on everything but actual statutory language is telling. While the Commission has broad authority to regulate all forms of electronic communication, including broadcasting, under Title I of the Communications Act, such authority is "not without limits."[18] Title I itself does not bestow "plenary authority over 'any and all enterprises which happen to be connected with one of the many aspects of communications.'"[19] The FCC's ancillary authority under Title I only supports regulation where the Commission has subject matter jurisdiction over the communications at issue and the regulation is reasonably required for the FCC to administer an explicit statutory obligation.[20]

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such a device or medium for making digital musical recordings or analog musical recordings." *See infra* Section III.

[16] RIAA Comments at 49-57.

[17] *But see infra* Section V.

[18] *MPAA v. FCC*, 309 F.3d 796, 804 (D.C. Cir. 2002).

[19] *United States v. Southwestern Cable Co,* 392 U.S. at 164 (quoting CATV and TV Repeater Services, 26 FCC 403 (1959)).

[20] *See United States v. Midwest Video Corp*., 406 U.S. 649 (1972) (plurality opinion); *United States v. Southwestern Cable Co*., 392 U.S. 157, 178 (1968); *MPAA v. FCC*, 309 F.3d at 806-7.

Neither requirement for ancillary authority is met here. Title I does grant the Commission subject matter authority over "all interstate and foreign communication by wire or radio," which includes broadcasting.[21] "Radio communication" is defined as "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding and delivery of communications) incidental to such transmission."[22] However, obeying a content protection scheme for digital radio is neither the transmission of a signal nor a service "incidental" to such transmission. Instead, it is a process that occurs after the transmission and reception of a signal. Similarly, the recording functions of consumer electronics equipment have nothing to do with the transmission of a signal, nor are they incidental to that transmission. Even if the Commission were to construe obeying the content protection as part of the reception of a signal, it would be insufficient to give the Commission jurisdiction over hardware devices. As the Commission has stated "[w]hile it might be argued that receiving facilities are incidental to radio transmission, the full extension of that argument would be unreasonable because it would require that all television and radio receivers be licensed as well as receive-only earth stations."[23]

Second, a content protection requirement for digital radio receivers would not be required to administer an ***explicit*** statutory obligation. As discussed in the preceding section, there is no express statutory obligation regarding digital radio or content protection for any kind of broadcast service.

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[21] 47 U.S.C. § 152(a).
[22] 47 U.S.C. § 153(33).
[23] *Regulation of Domestic Receive-Only Satellite Earth Stations*, 74 FCC2d 205, 217-18 (1979) (explaining that because receive-only earth stations do not transmit, they are subject only to voluntary licensing under the FCC's ancillary authority over spectrum so that such receivers can obtain protection from interference).

Moreover, in the absence of any express statutory authority to permit the Commission to impose radio content protection mandates, the Commission cannot rely solely on its "public interest" authority under Section 4(i) of the Communications Act.[24] The public interest authority does not give the Commission broad license to regulate any and all remotely related issues.[25] As the D.C. Circuit stated in construing *Southwestern Cable*, it is not enough for the Commission to merely claim that its action is somehow "in the public interest:"

> [T]he allowance of "wide latitude" in the exercise of delegated powers is not the equivalent of untrammeled freedom to regulate activities over which the statute fails to confer, or explicitly denies, Commission authority. It has been repeatedly recognized that Commission power over the communications industries is not unlimited, either as to the construction of the "public convenience, interest or necessity" standard as applied to activities clearly within its jurisdiction, or as to the extension of its jurisdiction to activities affecting communications.[26]

i. The Commission's Decisions in the Broadcast Flag Report and Order and the Plug and Play Second Report are Inapposite.

The RIAA relies heavily on the *Broadcast Flag Report and Order* [27]and the *Plug and Play Second Report and Order*[28] in support of its argument that the Commission has

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[24] 47 U.S.C. § 154(i).

[25] *See Motion Picture Ass'n of Am. v. FCC,* 309 F.3d 796, 806 (D.C. Cir. 2002); *In the Matter of Policy Regarding Character Qualifications In Broadcast Licensing*, 102 FCC 2d 1179, ¶51 (1986) ("[T]he use of the term 'public interest' in a regulatory statute is not a broad license to promote the general welfare. Rather, the words take meaning form the purpose of the regulatory legislation.") citing *National Association for the Advancement of Colored People v. Federal Power Commission,* 425 U.S. 662, 669 (1976). ("This Court's cases have consistently held that the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation.").

[26] *NARUC v. FCC*, 533 F.2d 601, 618 (D.C. Cir. 1976).

[27] *In the Matter of Digital Broadcast Content Protection*, MB Docket No. 02-230, Report and Order and Further Notice of Proposed Rulemaking, 18 F.C.C.R. 23550 (Nov. 24, 2003) [hereinafter *Broadcast Flag Report and Order*].

[28] *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics*

ancillary jurisdiction under Title I to require that consumer electronics and computer devices obey content protection rules for digital radio.[29] For the reasons discussed below, both decisions are inapposite here.

In the *Broadcast Flag Report and Order*, the Commission found as the basis for its ancillary jurisdiction Section 336 of the Communications Act, which outlines the Commission's responsibilities for licensing digital broadcast (or as it is referred to in Section 336, "advanced") television services.[30] Although the Consumer Group Coalition believes that Section 336 does not confer authority on the Commission to adopt a content protection mechanism scheme for digital television, that Section, at a minimum, explicitly recognizes digital television services and the digital television transition. There is nothing even remotely similar in the Act with respect to digital radio. Moreover, while the broadcast flag proceeding is at least nominally tied to the transition to digital television service and the important public interest goal of the return of valuable public spectrum, there is no similar interest associated with digital radio.[31]

The *Plug and Play Second Report and Order* is no more helpful in supporting a Commission grant of authority here. First, the Commission found ***express*** authority to adopt the encoding rules in that matter pursuant to Section 629 of the Communications Act, and its ancillary authority was also premised on that Section, which requires the Commission to assure the commercial availability for a wide range of navigation devices used in conjunction with multichannel video systems.[32] As discussed in detail above, no

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Equipment, Second Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd. 20,855 (2003) [hereinafter *Plug and Play Second Report and Order*]

[29] RIAA Comments at 50-51.

[30] *Broadcast Flag Report and Order* at ¶¶ 27-35.

[31] *See* Comments of the Consumer Group Coalition, *In the Matter of Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service,* MM Docket No. 99-325, 5 (June 16, 2004).

[32] *Plug and Play Second Report and Order* at ¶¶ 45, 55.

similar provision exists for broadcast radio in general or digital radio in particular. Second, the Commission's plug and play decision was merely a gap-filling supplement to an agreed-upon inter-industry framework, some parts of which were already in effect. In the digital radio context there is no such framework; the RIAA is asking that the Commission create a copy-protection framework for DAB *de novo*.

ii. The Commission Cannot Assert Ancillary Jurisdiction in the Absence of Evidence that Digital Radio Content Protection is Necessary to Preserve Free, Over-the-Air Broadcasting.

The RIAA provides a series of speculative harms should the Commission fail to adopt a digital radio content protection scheme. They argue first that if digital radio listeners are able to "cherry-pick" the songs they want to record, they will no longer buy music, which will give the recording industry fewer resources to put into new music.[33] Second, they argue that such "cherry-picking" will decrease its listening audience and therefore drive away the advertising base for broadcast radio.[34]

These arguments are completely unsupported by any factual record. Despite the fact that there are already over 2.5 million people in this country and millions of others in Europe who receive digital radio and tens of millions who receive digital music over cable television, the RIAA has presented not one scrap of evidence that "cherry picking" (or what has been known for over 30 years as "home recording") has diminished, rather than increased, the recording industry's revenues or decreased, rather than increased, its audience. Indeed, to the extent that the audience for analog over-the-air radio broadcasting has recently declined in this country, it is more likely the result of tight, overlapping playlists and increased advertising. Indeed, the country's largest radio owner

[33] RIAA Comments at 54-55.
[34] RIAA Comments at 55-56.

has recently announced that it would reduce the number of commercials it broadcasts each hour to gain back both audience and advertising dollars.[35] It is also curious that it is the recording industry, rather than the broadcast industry itself, that is portraying broadcast radio as endangered by home recording.[36]

The case for the Commission exercising its ancillary jurisdiction is substantially weakened by the lack of any evidence of harm to free-over-air broadcast radio.[37] In holding that the Commission lacked the authority to preempt state and local regulation of cable access channels for the purpose of requiring those channels to provide two-way point-to-point communications, the D.C. Circuit rejected the Commission's argument that such regulations were necessary to ensure further investment in cable services because of

> [i]ts highly speculative character. The Commission has itself conceded that "at present there are few, if any, proven, economically viable uses for two-way cable communications." The perceived necessity to require installation of a two-way capability, rather than allowing market forces to bring about such installations, is further evidence of the dubious economic character of two-way communications via cable in the immediate future. We therefore conclude that this argument must fail for lack of evidentiary support.[38]

The RIAA has not made the case, other than a few bald assertions, that a content protection scheme is necessary to preserve digital broadcast radio. In the absence of compelling evidence that content protection is necessary to preserve terrestrial broadcasting, the Commission has no authority to adopt such a mandate.

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[35] *E.g.*, Nat Ives, "A Radio Giant Moves to Limit Commercials," *NY Times*, July 19, 2004 at C1; Michele Gershberg, "Clear Channel Cuts Commercials to Gain Ad Dollars," *Reuters,* July 18, 2004

[36] *See infra* Section V. F.

[37] *See* Section V.

[38] *NARUC v. FCC,* 533 F.2d at 614-15 (footnotes omitted).

III. HOME RECORDING OF BROADCAST RADIO IS LAWFUL AND EXPLICITLY ENDORSED BY CONGRESS.

Simply because the RIAA calls lawful home recording of broadcast radio "cherry-picking" does not make it unlawful. Copyright law and the courts explicitly permit home recording of broadcast radio. While subsequent uses of recorded broadcast content could run afoul of copyright law, there is absolutely no valid debate about the legality of recording broadcast content for personal use.

The exclusive rights granted to copyright owners in section 106[39] of the Copyright Act do not allow copyright holders to prohibit personal recording of broadcast radio. In fact, section 114 of the Copyright Act[40] explicitly exempts over-the-air radio from the digital performance rights incorporated into section 106.

When Congress has explicitly addressed recording radio, each time it has clarified that personal home recording is lawful. The express language of the Audio Home Recording Act (AHRA), the Digital Performance Rights in Sound Recordings Act (DPRA), and the extension of the DPRA, support home recording of broadcast radio.

The AHRA covers any "digital audio recording device," "digital audio interface device," and "digital audio recording medium."[41] Under the AHRA, the manufacture of digital recording devices and the use of these devices for non-commercial purposes are explicitly permitted.[42] In addition to the plain language of the AHRA, the legislative history further expresses the clear aim of Congress: "It gives consumers a complete exemption for noncommercial home copying of both digital and analog music, even though the royalty obligations under the bill apply only to digitally formatted music. No

[39] 17 U.S.C. § 106.
[40] 17 U.S.C. § 114(d).
[41] 17 U.S.C. § 1001 *et seq.*
[42] *See id.*

longer will consumers be branded copyright pirates for making a tape for their car or for their children."[43] There is no doubt – Congress permits the home recording of broadcast radio – even digital home recording.

Although the RIAA cites the Digital Performance Rights in Sound Recordings Act (DPRA)[44] as support for DAB copy controls, the DPRA solely addresses interactive or subscription based digital transmissions or webcasts. Congress clearly distinguished these types of services from over-the-air broadcasts.[45] Congress purposefully chose not to extend a performance right to over-the-air broadcast radio.[46] The Senate Judiciary Committee stated:

> The Committee, in reviewing the record before it and the goals of this legislation, recognizes that the sale of many sound recordings and careers of many performers have benefited considerably from airplay and other promotional activities provided by both noncommercial and advertiser-supported, free over-the-air broadcasting. The Committee also recognizes that the radio industry has grown and prospered with the availability and use of prerecorded music. This legislation should do nothing to change or jeopardize the mutually beneficial economic relationship between the recording and traditional broadcasting industries.[47]

When the performance right granted in the DPRA was extended to cover some non-subscription services, Congress once again clearly exempted over-the-air radio.[48] In no way can the Commission read the language and history of the DPRA to suggest that technology restrictions and copy controls for digital radio are authorized or consistent with existing laws.

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[43] 138 Cong. Rec. H9029-01 (daily ed. Sept. 22, 1992) (statement of Rep. Hughes).
[44] Pub. L. No. 104-39, 109 Stat. 336 (1995) (codified in relevant part at 17 U.S.C. § 114(d)-(j)).
[45] *See* S. Rep. No. 104-128, at 14-15 (1995).
[46] *See* Pub. L. No. 104-39, 109 Stat. 336 (1995) (codified in relevant part at 17 U.S.C. § 114(d)-(j)).
[47] S. Rep. No. 104-128, at 14-15 (1995).
[48] 17 U.S.C. § 114(d).

In addition to the explicit language of the Copyright Act, the U.S. Supreme Court ruled that home recording of broadcast content for time shifting was lawful.[49] The advent of digital technologies and related actions of Congress[50] have not lead any courts to overrule this decision or disregard its applicability to new devices such as digital video recorders.

So, while the RIAA may fear the equivalent of the programmable VCR or DVR for DAB, the Supreme Court has already determined that time shifting with these devices is lawful.

Apart from the significance of the Supreme Court's ruling in *Sony*, no court has ever ruled that home recording of broadcast radio for personal use is unlawful. To the extent that the listener inappropriately uses, distributes, or even sells the recorded content, the copyright holder may have grounds for a claim of infringement. In these instances, existing laws adequately protect the rights of copyright holders from infringing acts. Permitting lawful recording of radio content does not prevent any copyright holder from pursuing infringers of that recorded content; in much the same way as the lawful purchase of a CD has not prevented the recording industry from pursuing consumers who share music from purchased CDs on the Internet.

Whether change is warranted in the AHRA, DPRA, or the *Sony* decision is a matter beyond the reach of the FCC and is a question well beyond the scope of the DAB initiative.[51] What is clear is that none of these acts or court decisions authorizes,

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[49] *Sony v. Universal City Studios*, 464 U.S. 417 (1984).
[50] *See, e.g.*, The Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C.).
[51] *See* Comments of the Home Recording Rights Coalition, MM Docket 99-325, 5-6 (June 16, 2004) (suggesting that the RIAA is asking for an administrative review or override of Congress' decision not to grant a performance right in broadcast radio).

commands, or even suggests that the Commission adopt technology mandates and home recording controls for digital radio. Any action that the Commission takes which prevents lawful home recording is clearly in conflict with the wishes of Congress and the Supreme Court.

IV. DAB RECORDING RESTRICTIONS ARE CONTRARY TO THE COMMISSION'S MOST RECENT ACTION WITH REGARDS TO CONTENT CONTROL.

The comments of the RIAA argue that the Commission's past actions provide support for their requested usage rules. However, the Commission's decision most on point, the *Broadcast Flag Report and Order*,[52] stands in stark contrast to the DAB controls requested by the RIAA.[53] While serious questions remain about the Commission's authority to adopt the broadcast flag scheme, the Commission made a clear effort to avoid copyright law and impacting consumer copying. ***The Commission stated, "we wish to reemphasize that our action herein in no way limits or prevents consumers from making copies of digital broadcast television content. Furthermore, the scope of our decision does not reach existing copyright law."***[54]

The Commission also asserted their sole target with regards to digital broadcast content control was "indiscriminate redistribution," adding: "This goal will not (1) interfere with or preclude consumers from copying broadcast programming and using or redistributing it within the home or similar personal environment as consistent with

[52] *Broadcast Flag Report and Order*.
[53] *See also infra* Section II. C. i.
[54] *Broadcast Flag Report and Order* at 23,555.

copyright law, or (2) foreclose use of the Internet to send digital broadcast content where it can be adequately protected from indiscriminate redistribution."[55]

The rules proposed by the RIAA go well beyond any of the Commission's past actions with regard to content control.[56] The broadcast flag *Report and Order* attempts to narrowly target a subset of uses of recorded content. However, the RIAA requests rules that directly target, and in many instances prevent, lawful home recording, and these limits clearly fall under the exclusive domain of copyright law.

V. THERE IS NO EVIDENCE THAT HOME RECORDING OF DIGITAL RADIO THREATENS THE RECORDING INDUSTRY.

A. DAB Technology is Not a New Path for Copyright Infringement.

Digital Radio is not a fundamentally new paradigm in radio, audio, or music distribution. It consists of a set of new technologies that will allow AM and FM radio broadcasters to provide slightly increased sound quality through digital transmissions without limiting the ability of listeners to receive analog broadcasts. Like most digital transmission systems, instead of a gradual falloff in quality when the listener has traveled too far from the source, the signal will abruptly "drop out" instead, although digital radio receivers may be designed to fall back to the analog signal when this occurs. In addition to these changes in quality and reliability, the digital broadcasts could include "metadata," which is additional information about the audio stream, such as the name of the artist and the title of the song being played.[57]

Otherwise, DAB is essentially the same as current radio. The same songs will be played on the digital streams as on the analog broadcasts – there will be no sudden

[55] *Broadcast Flag Report and Order* at 23,555.
[56] *See infra* Section VI. A.
[57] For a discussion of metadata, *see infra* Section V. C.

explosion of variety.[58] Radios will listen to and/or record a single station at a time – not to every station in the world, or even to every station in a given market. People will tune their radios in the same manner they always have – by picking a few stations which play music they like, rather than simultaneously scanning every station available.

The opportunity to record music off of digital radio will be very similar to that which is available, ***and legal***, with analog radio. With current DAB technology, in order to record a broadcast, the radio will have to be tuned to the correct station at the correct time, and told to record. The listener will only be able to record the songs played on the station he or she is listening to or which the radio has been programmed to tune itself to at a particular time. For the reasons discussed below, DAB receivers do not currently have the ability to automatically tune themselves to acquire a particular song, and it is unlikely that they ever will.[59]

B. DAB is Not a Higher Quality Source of Unprotected Content.

Although proponents of the DAB standard claim that it will deliver "near-CD quality,"[60] such claims strongly overstate the case. Any DAB recording will be significantly below the quality available through other digital sources, and will include the voice of the disc jockey introducing the current song, or parts of the previous and subsequent songs.

The bitrate of an audio stream describes the amount of audio data which is being transmitted, which in turn correlates to the quality of the audio heard by the user: a higher

[58] The interim requirements for DAB dictate that stations "broadcast the same main channel program material in both analog and digital modes." *NOI* ¶ 9.
[59] *See infra* Section V. C.
[60] *NOI* ¶ 2.

bitrate will generally correspond to higher quality sound. The maximum bitrate provided by iBiquity is 96 kilobits per second for FM. This is less than one tenth that of "raw" CD audio and significantly lower than the data rate of – and hence the quality provided by – currently available digital audio formats, including the popular MP3 format.

In fact, no public or proprietary format claims to achieve CD quality at the 96 kbps limit of the DAB standard. The two largest online music purchasing services, iTunes and Musicmatch, offer bitrates of 128 kilobits per second[61] and 160 kilobits per second,[62] respectively.[63] Further, a random sampling of popular music available on peer-to-peer networks shows that the vast majority of available songs are at 128 kbps or above – any rate below that is generally considered unacceptable. If listeners want "near-CD quality," they will have to use one of the many non-radio sources to get it.

In addition, the fact that there may be metadata in the DAB streams which would allow a recorder to identify a track electronically does not present any new capabilities when compared to other audio sources. Analog FM radio stations can already utilize the Radio Broadcast Data System (RBDS) to transmit metadata, including song names and artist names, to properly equipped receivers. Further, MP3 files available on peer-to-peer networks, audio CDs, "internet radio" audio streams, and music available for purchase online all contain the metadata necessary to identify and locate tracks electronically.

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[61] *See From a High-Tech System, Low-Fi Music*, **The Times Daily** (July 4, 2004), *at* www.timesdaily.com/apps/pbcs.dll/article?AID=/20040704/ZNYT05/407040383/-1/PHOTOS (reporting that iTunes bitrate of 128 kilobits per second does not provide high enough quality).

[62] *See* Musicmatch Store, *at* www.musicmatch.com/download/music_intro.htm.

[63] It is important to note that revenue from legal online music purchases from services like these are expected to reach $270 million in 2004, and $1.7 billion (12% of total music sales) by 2009. *See* Dinesh C. Sharma, *Study: Song Downloads to Hit a High Note*, **CNET News.com** (July 26, 2004), *at* news.com.com/Study%3A+Song+downloads+to+hit+a+high+note/2100-1027-5284030.html?part=dht&tag=ntop.

Finally, DAB doesn't offer all of the capabilities that other sources of digital audio provide. Not only is the quality lower, but AM Digital Radio broadcasts (with a maximum bitrate of roughly 36 kbps) do not support stereo sound – something which both analog radio and every available digital audio format (including MP3) offer. Given the reduced quality and features of DAB when compared to other digital audio sources, there is no reason to believe that DAB will be a more attractive method of obtaining high-quality music.

C. DAB Will Not Offer More Unprotected Content than Existing Sources.

Unlike other sources of digital audio, radio listeners do not truly get to chose what they listen to – they can only listen to what is being played on the radio at any given instant. In fact, the only songs that can be recorded are those that get enough radio play – rarely more than one or two songs per album. If the listener wants to get the rest of the songs by a given artist or on a given album, or wants to find something by a lesser known artist, then no matter how long he or she monitors the radio, if a given song is not available on the air, then that song will ***never*** be recorded. However, if a listener chooses to use one of the myriad of existing music products and services, he or she can find a much wider variety of music.

Further, while the recording industry points out that a popular song may be played up to once per hour in a given city,[64] this ignores the fact that a DAB-equipped radio receiver cannot monitor every channel in a given market simultaneously. Like analog radios, digital radios must be tuned to a particular frequency in order to receive audio

[64] RIAA Comments, Appendix, Thomas M. Lenard, Ph.D., *The Economic Impact of Digital Audio Broadcasts on the Market for Recorded Music* ¶ 68 (June 16, 2004).

signals. However, unlike television viewers, radio listeners typically do not know what music will be played at what time on a given station. While a given talk show or program might come on at a predictable time, there is no way to plan to tune to a station at the correct time to hear and record a particular song. Because of this, it is impossible to build a radio device which functions like a Digital Video Recorder, and automatically tunes to the correct station at the right time to record the desired song – the radio must actually be tuned to the station to figure out what song it is playing.

In order to actually monitor multiple stations, a radio would have to be designed to tune to many stations at once – a feat similar to building a television which can monitor every channel being broadcast simultaneously. This would require the radio to include a separate tuner and decoder for each channel that could be monitored. Because such a device would be both expensive (as the tuner and decoders are the most expensive parts of most radios) and have little extra utility, no such consumer machines have been made, or are likely to be built in the future. Granted, DAB devices can make the storage and replay of recorded music more convenient, but these functions are far from the unwarranted fears of the RIAA that DAB devices can be used for mass piracy and redistribution.

Device makers have indeed been innovating with respect to DAB products, but these innovations also fall far short of the concerns raised by the RIAA. For instance, the Woodstock DAB54[65] car stereo offers the ability to record digital broadcasts to a memory card, and automatically include the 20 seconds previous to hitting the record button (to catch the beginning of a given song). It also has the ability to record the radio at a pre-

[65] Blue Spot Car Audio, *at* www.bluespot.co.uk/stock/woodstock_dab54.asp.

programmed time of day. The Bug,[66] from Pure Digital, also has the ability to pause, rewind, fast-forward, and record digital broadcasts, much in the way that PVRs can pause, rewind, and fast-forward live TV. However, neither of these devices, which are among the most advanced DAB products available, can scan for and record a particular track, or monitor multiple stations at the same time in any fashion.

Overall, when compared to analog radio recording, DAB will allow users only a slightly easier and more convenient method to legally record and store the selection of songs made available on a particular broadcast station.

D. Recording DAB Does Not Result in Redistribution of Music Without Additional Steps.

If a listener were to use digital radio to obtain songs that he or she wanted to listen to – a legal act – there still would be no widespread infringement as a direct result. In order for the recording to become problematic, listeners would have to find a way to redistribute the music they legally recorded.

To send that music to others, a listener would have to transfer the audio data off of the DAB receiver and onto some sort of computing device. Once this was done, the listeners would have to connect to the very peer-to-peer networks they were originally choosing to avoid by using the radio. Finally, if a given radio listener chooses to redistribute their recorded music, the recording industry will have the same legal remedies against them which they have sought in several thousand lawsuits to date.[67]

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[66] The Bug, *at* www.thebug.com.

[67] See New Round of Illegal File Sharing Lawsuits Brought By RIAA, Press Release, Recording Industry Association of America (June 22, 2004), at www.riaa.com/news/newsletter/062204.asp; More Copyright Infringement Lawsuits Brought Against Illegal File Sharers, Press Release, Recording Industry Association of America (May 24, 2004), at www.riaa.com/news/newsletter/052404.asp; New Wave of Record Industry Lawsuits Brought Against 532 Illegal File Sharers, Press Release, Recording Industry Association of

E. There is No Evidence that Current Broadcast Content is the Source of Copyright Infringement.

For several years, it has been a trivial matter to digitize analog radio content and redistribute it as you might any other digital music. Not only do existing radios have both analog *and* digital outputs which can be plugged into computers,[68] but inexpensive devices for directly tuning to radio stations and recording them digitally on a computer are common.[69] However, with the proliferation of peer-to-peer file sharing and redistribution of music over the internet, there is no evidence that any of this audio has originated from broadcast radio.

Not only is it already possible to take analog radio and convert it to a digital form, but once the audio is digitized, it is no different than digital stream recorded directly off DAB. Any audio fingerprinting and database technology[70] that allowed for selective recording and cataloging of existing audio data would apply equally to audio data which had been obtained from an analog source or a digital source.

America (Jan. 21, 2004), at www.riaa.com/news/newsletter/012104.asp; See also John Borland, RIAA threat may be slowing file swapping, **CNET News.com** (July 14, 2003), at news.com.com/2100-1027_3-1025684.html; Erin Joyce, RIAA's Subpoena Strategy is Chilling Downloads: NPD, **siliconvalley.internet.com** (Aug. 21, 2003), at siliconvalley.internet.com/news/article.php/3066851; Lee Rainie et al., The state of music downloading and file-sharing online, The Pew Internet Project and Comscore Media Metrix (Apr. 2004), available at www.pewinternet.org/pdfs/PIP_Filesharing_April_04.pdf.

[68] *See, e.g.*, Panasonic SA-HE100K Features, *at* www.prodcat.panasonic.com/shop/NewDesign/ModelTemplate.asp?ModelId=18225&show_all=false&product_exists=True&active=1&ModelNo=SA-HE100K&CategoryId=2600.

[69] *See, e.g.*, AVerMedia USB Radio, *at* www.avermedia.com/cgi-bin/products_multimedia_usbradio.asp; ArchOS AV300 Remote, *at* www.archos.com/products/prw_500534_specs.html?sid=j22k2423b24okjybf2jofc.

[70] *See, e.g.*, *RIAA Comments*, Appendix, Jason Berman ¶ 12(c).

F. Broadcast Organizations Have Not Expressed Significant Concerns about Unprotected Broadcast Content.

No one stands to lose more from the loss of radio listeners than broadcasters. If radio listeners truly start automatically recording the songs they want without actually listening to the radio at all, and then cease tuning in after they have recorded enough, then stations will experience a great drop in listeners. Since stations are generally advertising-funded, a loss in listeners translates into a loss in revenue, and a threat to the very viability of the station. Despite this strong interest, no broadcasters have stated a strong belief that the FCC should mandate content protection for DAB.

In fact, Clear Channel Communications, Inc., the largest owner of radio stations in the United States, has already committed to roll out DAB in 1,000 of its stations.[71] Generally, it appears that broadcasters believe that the damage to the adoption of digital radio and the loss of potential new and larger audiences outweighs the potential loss of listeners through lawful home recording.

Additionally, pay music providers, such as iTunes and MusicMatch, also stand to lose revenue if DAB were to become a source of a wide-variety of high quality digital music. However, none of the digital music outlets have expressed any concern with DAB or DAB recording devices. Clearly, these businesses do not see DAB as any threat to their profits.

[71] *See* Janet Whitman, *Clear Channel to Roll Out Digital Radio at 1,000 Stations*, **CNN Money** (July 22, 2004), *at* money.cnn.com/services/tickerheadlines/djh/200407220025DOWJONESDJONLINE000009.htm.

G. The United Kingdom's Experience with DAB Reveals that Digital Radio is Not a Source of Copyright Infringement.

Jason Berman, Chairman and CEO of the International Federation of the Phonographic Industry (IFPI), has filed comments indicating his concern over the potential for copyright infringement using digital radio.[72] However, in discussing the impact of DAB since its rollout in the United Kingdom in 1995, Berman admits that there has not been any related widespread infringement. Even though the RIAA relies on the concerns expressed by Berman in its own arguments, it believes that the FCC should concentrate on Berman's fears rather than his experience.[73] The fact is that although DAB in the UK has been tagged with metadata and unprotected for almost 10 years, and over 300,000 DAB receivers were sold in the U.K. in 2003,[74] Berman is unable to offer evidence of any existing infringement problems linked to DAB.

Berman worries about the potential for infringement in the future, but in reality he is making the exact same extrapolations as the recording industry. All of the features which he fears will contribute to DAB-based recording and redistribution, from the use of a net connection for audio fingerprint databases (which are useless in the presence of tags, in any case) to the ubiquity of wireless networking, reinforce the conclusion that these *very same features* could be more easily used for other forms of non-DAB-related copyright infringement. Simply put, the IFPI is voicing the same fears as the RIAA, while nearly a decade of history shows no evidence that these fears are well-founded.

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[72] RIAA Comments, Appendix, Jason Berman.
[73] RIAA Comments at 75.
[74] *See* Skip Pizzi, *The BritDAB Invasion*, **Radio World Newspaper** (Mar. 28, 2004), *at* www.rwonline.com/reference-room/skippizzi-bigpict/06_rwf_pizzi_march_28a.shtml.

VI. THE RECORDING INDUSTRY'S REQUESTED RULES ARE INCONSISTENT WITH COPYRIGHT LAW, REASONABLE CONSUMER EXPECTATIONS, AND DEVELOPMENT OF DIGITAL RADIO.

Despite a lack of evidence showing that DAB will harm the recording industry and in the face of the clear wishes of Congress, the RIAA proposes radical restrictions on home recording of broadcast radio content.[75] No other commentator proposes the type of restrictions and mandates endorsed by the RIAA. In fact, the proposed rules would limit the abilities and rights of consumers to lawfully record DAB in such a way that there would be little incentive for radio listeners to adopt DAB. In addition, the RIAA rules seek to enforce rights that Congress has not granted to copyright holders.[76]

A. The RIAA's Proposed Rules are Contrary to the Clear Intent of Congress and Limit Lawful Consumer Activities.

A close look at the set of rules proposed by the RIAA reveals the extent of control that they seek.[77] In plain terms, the RIAA's proposed recording restrictions would eliminate any advances in radio that DAB might provide and would severely limit and in many cases prevent lawful home recording.

As discussed above, the Copyright Act permits home recording of broadcast radio without limit.[78] Nowhere is there mention of restrictions on how people may or may not use devices to record selected songs. The Copyright Act does not limit recording to certain minimum time periods and it does not prevent radio listeners from dividing their recordings into individual songs.

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[75] RIAA Comments at 58-59.
[76] *See* Comments of the Home Recording Rights Coalition, MM Docket No. 99-325, 5-6 (June 16, 2004).
[77] *Id.* at 58-59.
[78] *See infra* Section III.

Nonetheless, the RIAA asks that the FCC do what Congress has not – that is, limit home recording and outright ***prevent*** home recording in many instances. Without restating every usage rule here; some things that the RIAA usage rules would prohibit include:

- programmed recording for less than 30 minutes
- using metadata to fast-forward to the beginning or end of a recorded song
- storing a single song from a programmed recording
- listening to a recording session and choosing to save one or two songs from that session
- combining various recorded songs into one single "mix-tape"

None of these activities are currently prohibited with analog radio equipment, or with a combination of analog and digital equipment. More importantly, these arbitrary recording rules are unsupported by copyright law or reasonable consumer expectations.

B. Imposing Home Recording Rules on DAB Will Halt Consumer Acceptance of this New Technology and Will Prevent the Creation of Innovative DAB Products.

Consumers will reasonably expect more with digital, not less. Already, consumers can record television programming by simply selecting which program they wish to record. To some extent, this same function is available for analog radio using radio tuner cards and related software on a PC. Given consumer's current experiences with digital video recorders or personal video recorders, it is reasonable that consumers will expect similar functions with DAB.

Although TiVo-like programmed recording is not available for DAB devices, partly due to the different nature of radio programming and radio reception, DAB devices

can provide new conveniences to radio listeners. Storing single songs, making a collection of segments of radio broadcasts, and accessing recorded programs can all become easier with DAB devices.[79] These features could inspire the purchase of DAB equipment and in turn increase radio listenership.

However, in addition to usage rules, the proposed RIAA rules require that all DAB devices and downstream technologies incorporate robust controls that give force to these limitations. So, not only will consumers be prohibited from engaging in lawful activities, but DAB devices, outputs, and downstream technologies will be saddled with technology requirements (unlikely to stop sophisticated infringers) that raise their expense and development time. Most of the conveniences DAB devices could offer over analog would cease to exist under the RIAA's proposed plan.

Ultimately, a technology mandate of the nature requested by the RIAA would force every DAB device maker and downstream device maker back to the drawing board. As the RIAA points out, there are a number of DAB receivers currently available, but none of these devices incorporate the types of controls the rules requested by the RIAA require. It is impossible to predict how long implementing these controls would take, but clearly there would be a significant delay due to the redesign, new technology, and manufacturing associated with incorporating such a massive mandate. This delay – to say nothing of the restricted end result – will not only slow DAB adoption and raise costs but will outright prohibit most radio listeners from adopting DAB.

[79] *See infra* Section V. C.

VII. CONCLUSION

The Commission should proceed to rollout DAB without hobbling DAB devices, downstream equipment, and lawful home recording. Even if there was some measurable copyright infringement associated with DAB – which there is not – the Commission has no authority to implement home recording restrictions and technological mandates with regards to DAB and DAB devices. Most importantly, home recording of broadcast radio is lawful and any attempt to limit or prevent these activities is a matter of copyright policy that goes against the express intent of Congress. This proceeding, considering possible content control for DAB, should end without any further action and the

Commission should act quickly to ensure a robust, and consumer friendly, DAB marketplace.

Respectfully Submitted,

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